

Pages 1 - 50

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg, Judge Presiding

FINJAN, LLC,)	
)	
Plaintiff,)	
)	
VS.)	NO. 3:14-cv-04908-RS
)	
PALO ALTO NETWORKS, INC.,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, November 14, 2024

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

FISH & RICHARDSON PC
12860 El Camino Real - Suite 400
San Diego, California 92130

**BY: ROGER DENNING
JUANITA BROOKS
TYLER TRAIN
ATTORNEYS AT LAW**

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

STENOGRAPHICALLY REPORTED BY:
Kelly Shainline, CSR No. 13476, RPR, CRR
Official Reporter

APPEARANCES: (CONTINUED)

For Defendant:

MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105

BY: TIMOTHY SAULSBURY
MATTHEW I. KREEGER
JOHN DOUGLASS
ATTORNEYS AT LAW

MORRISON & FOERSTER LLP
250 W 55th Street
New York, New York 10019

BY: KYLE W.K. MOONEY
ATTORNEY AT LAW

Also Present:

Andrea Gothing, Finjan In-House Counsel
Ann Taylor, Finjan IP Specialist

Thursday - November 14, 2024

2:05 p.m.

P R O C E E D I N G S

---000---

THE CLERK: Calling Case 14-cv-4908, Finjan vs.
Palo Alto Networks.

Counsel, please come forward and state your appearances.

MR. SAULSBURY: Good afternoon. On behalf of
Palo Alto Networks you have Tim Saulsbury from the Morrison
Foerster firm. I'm joined by my colleagues Kyle Mooney, John
Douglass, and Matt Kreeger.

THE COURT: Good afternoon.

MR. DENNING: Good afternoon, Your Honor. Roger
Denning of Fish & Richardson on behalf of the plaintiff Finjan.

MS. BROOKS: And also Juanita Brooks of Fish &
Richardson on behalf of Finjan.

MR. DENNING: We have our colleague Tyler Train from
Fish & Richardson here as well; as well as Andrea Gothing,
in-house counsel for Finjan; and Ann Taylor, in-house IP
specialist for Finjan.

THE COURT: Good afternoon.

MR. DENNING: Good afternoon.

THE COURT: So we are here on motions for summary
judgment and at this juncture in this long-lived case, which
has been touched by several of my colleagues, I believe, we
have, I think, three patents remaining -- the '408, the '633,

1 and the '731 -- and there are various arguments with respect to
2 each of these different patents.

3 So why don't I go ahead. I was going to start with the
4 moving party, as I usually do, so -- but I would actually
5 encourage counsel for Finjan to step up because we can do this
6 patent by patent as opposed to going through all three and then
7 you go going through all three.

8 So whoever wants to speak can come on up, but I'll look
9 first to the moving party.

10 **MR. SAULSBURY:** Thank you, Your Honor.

11 And just a brief housekeeping item. I think we're going
12 to be able to address the issues without asking to close the
13 courtroom or anything of that nature, notwithstanding that they
14 get into technical issues.

15 I wasn't sure if there was anybody still on the Zoom link.

16 **THE COURT:** Well, this is where we probably have
17 some -- this is an open courtroom. I'm not sealing the
18 courtroom.

19 **MR. SAULSBURY:** Surely, Your Honor.

20 **THE COURT:** And I also don't have a problem with
21 somebody on Zoom. And I think I've, in this case, given you my
22 spiel about oversealing, but I feel particularly strongly that
23 the courtroom does not get sealed. So there we are. So if
24 somebody is listening, they can listen as far as I'm concerned.

25 **MR. SAULSBURY:** Okay.

1 **THE COURT:** All right?

2 **MR. SAULSBURY:** Thank you, Your Honor.

3 **THE COURT:** Okay. So whoever wants to discuss this,
4 come on up. I assume there's somebody on that side.

5 **MR. MOONEY:** Kyle Mooney, Your Honor.

6 **THE COURT:** Okay.

7 **MR. MOONEY:** I've got some slides. If I could hand
8 those up.

9 **THE COURT:** Of course, because this is a patent case
10 and no motion has ever been argued without PowerPoints in a
11 patent case.

12 **MR. MOONEY:** I'll try to limit it, Your Honor.

13 **THE COURT:** Thank you.

14 Okay. Off you go.

15 **MR. MOONEY:** Again, Kyle Mooney, Morrison & Foerster,
16 representing Palo Alto Networks, Your Honor.

17 And we want to begin with the '408 patent in our motion
18 for summary judgment of noninfringement of that patent.

19 Appreciate your patience, Your Honor.

20 The '408 patent -- we're going to have to go with the --

21 **THE COURT:** Listen, I've got it in --

22 **MR. MOONEY:** Hard copy.

23 **THE COURT:** You've given it to me in paper form.
24 Let's just --

25 **MR. MOONEY:** Let's just do the paper, Your Honor.

1 **THE COURT:** -- barrel ahead.

2 **MR. MOONEY:** If you could turn to Slide 3, Your Honor.

3 **THE COURT:** Okay.

4 **MR. MOONEY:** And the '408 patent, as Your Honor heard
5 a few months ago, is directed to an allegedly more efficient
6 way to scan for malicious program code.

7 Finjan's original claims for this patent were directed to
8 analyzing different programming languages using different
9 rules, different parser and analyzer rules. The PTO rejected
10 those claims as obvious based on prior art, and so Finjan
11 amended the claims to the current claims that we're dealing
12 with today; and those claims require that a computer first
13 determine what programming language code is written in and then
14 based on that determination, instantiate or start a scanner for
15 that particular programming language.

16 And so, for example, in Figure 7 of the patent, there are
17 three different scanners for three different programming
18 languages -- HTML, JavaScript, and URI -- and then each of
19 those scanners include the rules and the analyzers for that
20 particular language.

21 And on the next slide, Slide 4, we have Claim 1. And
22 these requirements are built into the claims. Claim 1 and
23 Claim 22 are the independent claims, and these claims require
24 that the computer first determine -- this is the yellow
25 highlight -- any specific one of a plurality of programming

1 languages in which the incoming stream is written, and then
2 instantiate or start a scanner for that specific programming
3 language in response to said, that is after said, determining.

4 Finjan cannot prove that the accused products, NGFW or
5 WildFire, meet these limitations, and the reason for that is
6 that both of them allegedly include a single scanner that
7 handles multiple different programming languages.

8 And so beginning with NGFW, this is on Slide 5, I asked
9 Dr. Min, Finjan's technical expert, at his deposition what the
10 alleged scanner in NGFW was. And I handed Dr. Min what is
11 Exhibit 38 shown on the left of this slide without the red and
12 the blue markings, and I asked Dr. Min to identify the alleged
13 NGFW scanner that he relied on. And Dr. Min did that with the
14 red pen and he included the entirety of the blue box, which is
15 titled "CTD Engine" at the top and he also wrote "App ID" and
16 circled that.

17 And Dr. Min's also got some red handwriting at the top.
18 Again, all of the writing on this exhibit is that of Dr. Min,
19 Finjan's expert. And his testimony on this slide is very
20 clear. This was the alleged scanner that he relied on for
21 NGFW, that is the CTD engine and App ID, and he did not rely on
22 any other scanner for that product.

23 And so on the next slide, this is Slide 6, Dr. Min
24 acknowledged that this NGFW scanner that he relied on, the only
25 one he relied on, could handle multiple different programming

1 languages. Accordingly, NGFW does not instantiate and Finjan
2 cannot show it instantiates a scanner for a specific
3 programming language.

4 Next slide, Slide 7.

5 And because it has a single scanner that handles multiple
6 different programming languages, NGFW also does not need to and
7 does not determine a programming language before it
8 instantiates or starts a scanner for that language. That's
9 clear based on the last testimony and it's doubly clear based
10 on the testimony on this Slide 7.

11 And here on Slide 7 on Exhibit 38 I asked Dr. Min to
12 identify using a blue marker the parts of NGFW determining
13 programming languages. And as Your Honor can see, all of those
14 parts that determine programming language are part of the
15 scanner itself. Dr. Min circled two modules inside the CTD
16 engine, those are his two blue circles; and he also circled
17 App ID. All of these are part and parcel of the scanner
18 itself. Accordingly, NGFW doesn't determine any programming
19 language before it starts or instantiates the scanner.

20 Now, Finjan had a couple of responses here. First, they
21 pointed to Dr. Min's expert report suggesting, I guess, that he
22 had different opinions in that report; but if you look at that
23 report beginning on Slide 8, Dr. Min's opinions there are
24 consistent.

25 Dr. Min -- and I want to be clear about this -- Dr. Min

1 does not have any opinion that NGFW first determines a
2 programming language and then instantiates a scanner for that
3 specific programming language.

4 To the contrary, all the programming language, specific
5 rules, or analyzers that Dr. Min identifies are part of or
6 inside the alleged NGFW scanner that you saw him identify on
7 Exhibit 38, all of them. And so, for example, paragraph 353 on
8 Slide 8, which is one of the paragraphs that Finjan called out
9 in its brief, here Dr. Min opines that there is a scanner, a
10 single scanner, that comprises parser rules and analyzer rules
11 for different languages. Well, that was the prior art and
12 that's not what the claims require in this case.

13 On Slide 9 there are other examples of Dr. Min identifying
14 a single scanner that has different rules for different
15 languages. Even if that were true, that is not what the claims
16 require and, again, that's exactly what the prior art had in it
17 before Finjan amended the claims around it.

18 Slide 10. Finjan understands, I think, that Dr. Min's
19 admissions effectively foreclose their infringement theory, and
20 so Finjan devotes a good amount of its opposition to asking
21 this Court to rewrite the claims in this case.

22 And so Finjan now is arguing for the first time that the
23 claims of the '408 patent actually cover a situation where you
24 have a single scanner that handles multiple different
25 programming languages and that determines and adapts to

1 programming languages after it is started, after it is
2 instantiated.

3 The Court shouldn't rewrite the claims for Finjan. First
4 slide at Slide 11, as an initial matter, that's not what the
5 claims say. The claims on their face, Claim 1, clearly
6 requires that the computer determine a programming language and
7 then, and only then, in response to that determination start a
8 scanner for that specific language.

9 The order of operations is 100 percent clear in Claim 1
10 and Claim 22; and, moreover, some of the dependent claims refer
11 to specific individual programming languages rather than
12 encompassing a situation where there are multiple languages.

13 In Slide 12, Finjan's current position was contradicted by
14 its expert. More than a year before, it argued for its
15 interpretation to Your Honor in its opposition brief.

16 I asked Dr. Min about 18 months ago at his deposition [as
17 read]:

18 "Does a computer that instantiates a scanner before
19 it has determined any programming language of the incoming
20 stream meet Claim 1 or Claim 22 of the '408 patent?"

21 And Dr. Min responded [as read]:

22 "And I -- I just told you it has to be in response to
23 determining, so it would not meet the scope."

24 So Dr. Min a year and a half ago contradicted the
25 interpretation that Finjan is now stepping forward with. And

1 Dr. Min certainly doesn't have any opinions the claims should
2 be interpreted otherwise or that there be infringement under
3 the interpretation he clearly was not taking.

4 And, lastly, on Slide 13, Finjan's position is not only
5 contradicted by its technical expert in this case, it's also
6 contradicted by Finjan's own arguments in another case.

7 Finjan took the opposite position just a few years ago in
8 the *Rapid7* case before Judge Noreika in Delaware. In that
9 case, *Rapid7*, the defendant argued something along the lines of
10 what Finjan is arguing here, and that is that Claims 1 and 22
11 of the '408 were directed to a single scanner that handled
12 multiple different programming languages and that could adapt
13 to those languages.

14 *Rapid7* cited many of the same specification disclosures
15 that Finjan relies on here; but in that case a couple of years
16 ago, Finjan said, "No." Finjan said that that is not right,
17 that is not how the claims should be interpreted and it argued
18 against that interpretation. Instead, Finjan argued that the
19 claims require that the instantiated scanner be for the
20 specific programming language, and Judge Noreika accepted that
21 information.

22 And so Finjan is likely judicially estopped, as we argue
23 in our papers. Even if they are not, it's clear on the record
24 that the position Finjan takes today is 180 degrees from the
25 position they took in another case a year and a half ago.

1 And so in sum, NGFW can't meet and Finjan cannot show it
2 meets those two limitations.

3 The next product, Your Honor, is WildFire, Slide 14.
4 Finjan can't show that WildFire meets these limitations either.
5 Again, at his deposition I asked Dr. Min to identify the
6 WildFire scanner that he is relying on to prove infringement,
7 and Dr. Min circled in red on Exhibit 43 -- again, all the
8 markings on this exhibit are Dr. Min's using markers at his
9 deposition -- Dr. Min circled the static analyzer, that's top
10 left, and the dynamic analyzer, that's in the middle of the
11 page. And Dr. Min confirmed that the static analyzer together
12 with the dynamic analyzer is the scanner he relied on. Very
13 clear, Your Honor.

14 I asked him [as read]:

15 "So you've identified in Exhibit 43 the only scanner
16 that you rely on in forming opinions about WildFire?"

17 And he told me then [as read]:

18 "Yes. What I identified in Exhibit 43 is the scanner
19 that I identified."

20 The same problems exist with respect to this scanner,
21 Your Honor. And so on Slide 15 I asked Dr. Min the same
22 question about WildFire, the WildFire scanner, that I asked
23 about NGFW. I asked whether this WildFire scanner he relied on
24 can handle multiple different languages, and he said, "Yes."

25 And so, again, the WildFire scanner, much like the prior

1 art, can handle multiple different languages. Finjan cannot
2 prove that it is instantiating a scanner for a specific
3 programming language.

4 And, again, because of that, on Slide 16, Finjan can't
5 prove that it determines a programming language before it
6 instantiates a scanner for that language. They can't prove
7 that because it doesn't do that because it doesn't have to
8 because it handles multiple different languages.

9 And, again, just for clarity, on Slide 16 I asked Dr. Min
10 to circle the parts of WildFire that determine programming
11 language; and, once again, all of those parts that he
12 identified in blue are inside of the scanner itself showing
13 that the scanner handles multiple languages, not a single
14 programming language.

15 Finjan had a couple of responses on the WildFire point.
16 Also, they pointed again to Dr. Min's expert report. It was
17 effectively the same problem, Your Honor. Dr. Min does not
18 have any opinion that WildFire first determines a programming
19 language and then instantiates a scanner for that specific
20 programming language.

21 Again, the programming language specific rules, the
22 analyzers, the other components that Finjan now points to in
23 Dr. Min's report to try to save its claim are all part of and
24 inside the alleged scanner that Dr. Min told me was the only
25 one that he relied on, and that's true of paragraph 424 and on

1 the next slide this is true also of paragraphs 426 and 427.

2 And so in sum, Your Honor, Finjan cannot prove
3 infringement of the determining and instantiating limitations
4 of the asserted claims for any of the accused products in this
5 case.

6 **THE COURT:** Thank you.

7 Mr. Denning, do you want to talk about '408?

8 **MR. DENNING:** I'm sorry, Your Honor?

9 **THE COURT:** Do you want to talk about '408?

10 **MR. DENNING:** I absolutely do. I'm sorry. I just
11 couldn't hear you.

12 To set the table to remind us where we are, this is a
13 summary judgment hearing. The issue that we're faced with is
14 whether any reasonable jury could find infringement based on
15 the opinions expressed in Dr. Min's report. So I want to focus
16 on what Dr. Min actually said with regard to these limitations.

17 PAN argues that the NGFW and WildFire contain a single
18 scanner rather than one for each of the different programming
19 languages. That entire argument is based on those two figures
20 that they showed Dr. Min in his deposition, two very high-level
21 block diagrams of NGFW and WildFire. He says: Yeah, scanner,
22 there's a lot that happens inside of that scanner. There's a
23 lot that happens inside of WildFire. They never addressed
24 that.

25 Dr. Min did in detail. He looked in detail at the PAN

1 documents, he looked in detail at the PAN source code to see
2 what happens when they get a new file in. What does the
3 scanner do at that point? And he unequivocally said it
4 determines the programming language and then instantiates a
5 scanner based on that language.

6 **THE COURT:** So go over for me again why you think
7 it's -- when he does one circle, that that's not indicative of
8 him saying it's one scan.

9 **MR. DENNING:** Sure. So that's the thing that does --
10 the thing he circled is the thing that gets the incoming file,
11 it determines the programming language, and then it
12 instantiates a scanner that then continues on the analysis as
13 it goes down.

14 That scanner that's -- that is -- I'm blanking on the
15 word. I've said it a million times this week --
16 instantiated --

17 **THE COURT:** It is a strange word.

18 **MR. DENNING:** I looked it up. I looked it up on
19 Webster's.

20 **THE COURT:** Right.

21 **MR. DENNING:** Like, what does this mean?

22 **THE COURT:** Yeah, no, it's straight.

23 **MR. DENNING:** It's basically create a new instance of
24 or something along those lines.

25 **THE COURT:** Okay.

1 **MR. DENNING:** It creates a new instance of a scanner
2 for HTML or a scanner for, you name it, JavaScript, a scanner
3 for Visual Basic. It makes a new scanner based on the language
4 of the file that's coming in.

5 **THE COURT:** So it's just your miscommunication; they
6 didn't understand what you were trying to impart?

7 **MR. DENNING:** Miscommunication is one way to put it,
8 but I think that's not what Dr. Min meant and it's in complete
9 contravention to what he said in his expert report repeatedly.

10 I'm shocked to hear representations that Dr. Min never
11 said that NGFW determines the programming language and then
12 instantiates a scanner based on it because he said it dozens of
13 times in his expert report, and I'm willing to talk you through
14 those and show you exactly where it is.

15 **THE COURT:** Well, he can't create his own issue by
16 being inconsistent. So --

17 **MR. DENNING:** I think it was --

18 **THE COURT:** -- in the questions -- I mean, there's not
19 like -- it's not a trick question here. These questions are
20 pretty straightforward. So I'm not sure I follow why you think
21 I should disregard what your counterpart has said about his
22 answers. Because there's no, you know, "I don't understand
23 what you're saying. Could you be more specific?" It's he's
24 answering it and he makes these circles.

25 **MR. DENNING:** I think -- I think he's saying: What

1 does the scanning? This block. It happens in there.

2 Now, there's a different scanner based on each programming
3 language. That happens within that block. So what's the
4 scanner? Here it is.

5 But it's in software --

6 **THE COURT:** It's somewhere in here and it may be more
7 than one?

8 **MR. DENNING:** It's somewhere in here and it's created
9 a new -- every time there's a new file, it has to create a new
10 scanner for every new file. It's not like there's a scanner
11 there and it's the same one that's used over and over and over
12 and over. This is software. This is source code. It creates
13 a new one. For every file that comes in, it instantiates a new
14 scanner. It never uses an old one. It's a new one.

15 And just as a reminder, the parties agreed -- and this was
16 in Docket 1641, one of the claim construction agreed-upon
17 terms -- that scanner can be, quote, "software, hardware, or a
18 combination of both for scanning."

19 So software that does the scanning that's instantiated
20 because I know this is HTML, so instantiate an HTML software
21 scanner, that's exactly what happens. Sure, that happens in
22 this big thing that Dr. Min circled and generally said, "That's
23 the scanner," but there's a new one for each of these
24 languages, and I'm happy to talk you through.

25 I was at the *Markman* hearing and heard Your Honor loud and

1 clear about your dislike of demonstratives, so I didn't prepare
2 any for this but I'm happy to talk you through in our --

3 **THE COURT:** It -- I hope people -- the bar doesn't
4 say, you know, "Seeborg doesn't like demonstratives." Actually
5 demonstratives are great and they're very useful in trial and
6 other things like that.

7 And my only comment was, and I don't want it to be
8 taken -- I don't want you to run with it, it's almost an aside
9 that seems like there's no motion in a patent case that doesn't
10 have PowerPoints, but I'm not -- I'm not hostile to them. I'm
11 not trying to, you know, do in them, but I also think you can
12 make your arguments without them.

13 So, you know, don't worry if you think, "Oh, my God, they
14 got a demonstrative on the other side and he didn't get mad at
15 them, so we should have done a demonstrative." Don't worry
16 about that. It's -- but also, going forward I'm not, you
17 know -- if you want to use a demonstrative, go ahead and use
18 it.

19 Go ahead.

20 **MR. DENNING:** Thank you, Your Honor.

21 You know who's most happy to hear that? Ms. Brooks, my
22 colleague, who has demonstratives --

23 **THE COURT:** Okay.

24 **MR. DENNING:** -- and will be showing you those a
25 little bit later.

1 But the things that I want to point out to you are in our
2 opposition brief, and so I don't need demonstratives. You can
3 read them yourself.

4 For instance, all of the things that PAN has ignored where
5 Dr. Min looks under the hood to say, "Well, how does this thing
6 that I called a scanner actually do the scanning," are
7 contained in his expert report with lines like, and this is on
8 page 2 of our opposition [as read]:

9 "PAN's NGFW includes a scanner (e.g., the content
10 threat detection engine and its components decoder and
11 detector pattern match) that work in conjunction with the
12 application engine APID" -- which he wrote on one of those
13 slides -- "to analyze a stream."

14 Okay? It's going to analyze the stream of data.

15 How does it do that? Well, he points to a function that's
16 called the panav__init__state function. It's a software
17 function. And this is, again, on page 2 of our opposition.
18 That function instantiates a scanner for the specific
19 programming language corresponding to the file type, and it
20 does so by calling other functions.

21 And so the panav__init__state function will call the
22 panav__parse__html function to instantiate an HTML scanner, the
23 panav__parse__powershell to instantiate a PowerShell scanner.
24 Same thing for JS, that's JavaScript; VBS, that's Visual Basic.

25 Dr. Min said: That's -- first it's determining what the

1 language is and then it's instantiating an instance --
2 right? -- a new scanner that's going to -- that's going to then
3 process the rest of that.

4 **THE COURT:** And your fundamental point is his answers
5 in the deposition are not inconsistent.

6 **MR. DENNING:** Not inconsistent, just --

7 **THE COURT:** Because if they are inconsistent, then the
8 fact that he may have set out a very detailed description in
9 his expert report doesn't mean he can't in his deposition go
10 the other way and effectively take himself out.

11 **MR. DENNING:** Sure. I think his answers at deposition
12 were at a much higher level of abstract than what he put into
13 his source code analysis, for instance. So when they said,
14 "Where's the scanner," he has no problem, "Sure, here's the
15 scanner," because that's what executes all of these many, many
16 functions below.

17 And, Your Honor, at pages 2, 3, 4, I won't belabor the
18 point, but it is just chocked full of statements from Dr. Min
19 about how the NGFW scanner does exactly that.

20 The WildFire scanner does the same thing. It has a
21 function that's called static analysis, and at line 194 of that
22 function it calls a function called static analyzer factory to
23 determine the programming language in which the incoming stream
24 is written. And that's on page 3, lines 9 through 11, of our
25 opposition is the snippet from Dr. Min's expert report where he

1 talks about these precise functions.

2 And then a little further down on lines 13 through 16 is
3 more from Dr. Min's report where he says: Okay. After static
4 analyzer factory determines the programming language, it then
5 calls a function -- oh, the function dynamic -- I'm sorry --
6 static analyzer factory to then instantiate the specific static
7 analyzer.

8 It does the same thing for dynamic analysis. It has a
9 function called `dynamic__analysis__retry`, which determines the
10 programming language and then instantiates a specific virtual
11 machine or a scanner and corresponding dynamic analyzer
12 specific to the programming language, Java, Android, PDF. He
13 shows the source code as well for that.

14 So there's nothing inconsistent with his deposition and
15 his expert report, but to draw conclusions from his high-level
16 deposition testimony that ignore what he says about the
17 low-level functionality in the guts of the source code is
18 inaccurate. They work together, but you can't say, "Oh, he
19 said one scanner so forget everything he said down here about
20 how there are multiple scanners that get instantiated."

21 PAN doesn't cite any evidence showing that NGFWs and
22 WildFires do not do that. Their argument is based on this line
23 of questioning from Dr. Min's deposition, but they don't say
24 the opposite. All they do is they point to one conclusory
25 opinion from Dr. Rubin that says "NGFW includes a single

1 scanner," but that's it on the other side in contravention to
2 Dr. Min's page after page of source code analysis.

3 A reasonable jury could decide to believe Dr. Min. Based
4 on that analysis, summary judgment is inappropriate.

5 I have more that I can go to --

6 **THE COURT:** You do have the burden of infringement.

7 **MR. DENNING:** We do have the burden of infringement,
8 and we will bear that burden at trial, but today PAN bears the
9 burden of showing no reasonable jury could find infringement.
10 That's a very different burden, and I submit they have not met
11 it.

12 One last thing I will point Your Honor to is on page 6 and
13 7 of our brief, we put a big snippet from Dr. Min's expert
14 report and color-coded it to give a little bit of insight into
15 what part he thinks is doing the determining of the language
16 and what part is doing the instantiating of the scanner. It's
17 well laid out there.

18 There was talk about rewriting the claim. That's not our
19 position. The claim does not need to be rewritten. The claim
20 is fine the way it is. PAN infringes the way it is. It's a
21 scanner is instantiated based on the programming language that
22 is determined.

23 I think PAN has inaccurately represented what Finjan said
24 in the *Rapid7* case. In the *Rapid7* case, Rapid7 wanted to add
25 limitations into the construction; and Finjan said, "There's no

1 need for that, no need to narrow the claim by adding those
2 limitations. This is already in the claim."

3 But we're not asking the Court to do that. We're not
4 asking the Court to rewrite the claim so I'm not going to spend
5 much time on that argument. I don't think PAN characterized
6 the comments accurately, but that's not -- we don't think the
7 Court should rewrite the claims to begin with. We think
8 they're just fine the way they are.

9 With that, I'll stop.

10 **THE COURT:** Okay. Very briefly, and then we'll go on
11 to the '633.

12 **MR. MOONEY:** Thank you, Your Honor, very briefly.

13 First, counsel pointed to some evidence -- some excerpts
14 from Dr. Min's report about the WildFire static analyzer. I
15 think it was 426 and 427 of Dr. Min's report. Those do not
16 establish that these elements are met. The claims require
17 determining a language and then instantiating.

18 And, in fact, what Dr. Min's report makes clear is that
19 the static analyzer itself handles multiple different
20 programming languages and so it can't be the scanner even if
21 that's the new position.

22 Number two, there's discussion at the beginning about the
23 drawings that Mr. -- Dr. Min was shown, how they were high
24 level, perhaps confusing. The drawings that Dr. Min was shown
25 were drawings that he used in his expert report at, for

1 example, paragraphs 131, 377, 585, 658, and 749. He was
2 familiar with those, and his testimony was 100 percent clear,
3 and it was the testimony that Your Honor saw and not a
4 different version of that testimony that we're hearing today.

5 And, lastly, as Your Honor noted, this is Finjan's burden
6 to prove noninfringement, not ours; but Dr. Rubin did, in fact,
7 testify, and it's in our papers, that these limitations are not
8 met.

9 Thank you, Your Honor.

10 **THE COURT:** Okay. The '633.

11 **MR. SAULSBURY:** Thank you, Your Honor.

12 We have a brief set of demonstratives. May I please
13 approach?

14 **THE COURT:** Thank you.

15 Okay.

16 **MR. SAULSBURY:** Thank you, Your Honor.

17 The argument on the '633 is fairly straightforward here.
18 As you'll recall, at claim construction the dispute was over
19 whether a downloadable-information destination was merely a
20 device that can perform the recited functions or whether it had
21 to be a user device. The Court concluded that the term should
22 be construed to be a user device not merely a device.

23 The Court also rejected Finjan's alternative proposal,
24 which would have allowed the Court to construe it as user
25 device but include a caveat that a user device can be any

1 device. And so that was rejected at *Markman* as well. And so
2 we know that to meet the requirements of asserted Claim 14,
3 Finjan was required to identify a user device.

4 And the problem with Finjan's infringement case -- if we
5 could please turn to Slide 4 -- is that for neither of the two
6 WildFire products they accuse do they have any expert analysis
7 showing that they have a user device.

8 The two products at issue are the WF-500 that is a
9 physical server product and the second accused device is the
10 WildFire Public Cloud.

11 And if we take a look at the evidence that Finjan cites in
12 its opposition in support of its argument that it sufficiently
13 identified a user device, with respect to the WF-500 -- again,
14 this is the physical device -- they point to the testimony of
15 its expert, Dr. Keromytis. And we've highlighted here what
16 Finjan relies on its opposition where Dr. Keromytis says, with
17 respect to the WF-500 appliance [as read]:

18 "So that is a -- when it is used, that is a
19 downloadable-information destination."

20 Under Federal Circuit law, this type of parroting of the
21 claim language without any analysis is not sufficient to oppose
22 summary judgment. We've cited a variety of cases in our
23 briefing for this and the point appears to be undisputed.

24 The other thing Finjan relies on with respect to WF-500 is
25 this testimony later in the same excerpt where Dr. Keromytis

1 says [as read]:

2 "So paragraph 384, that says it's the same
3 functionality; and then in my analysis, I didn't see a
4 distinction so I didn't feel the need to actually say,
5 'Well, yeah, it's also the same for WF-500.'

6 This is where he's relying on some analysis that he did
7 for the Public Cloud to assert the WF-500 infringes.

8 Ultimately, he said [as read]:

9 "I do include the WF-500 in the list of products that
10 infringe."

11 Again, that sort of conclusory assertion that something
12 infringes under circuit law cannot defeat summary judgment.

13 **THE COURT:** Don't you -- you also offer up Dr. Rubin
14 in this context as providing effectively a contrary position to
15 Dr. Keromytis.

16 **MR. SAULSBURY:** Keromytis.

17 **THE COURT:** Keromytis. Remind me of that.

18 **MR. SAULSBURY:** That is true, Your Honor. Dr. Rubin
19 comes to an alternative conclusion, and his conclusion is based
20 upon evidence explaining why neither the WF-500 nor the
21 WildFire Public Cloud are user devices. He actually addresses
22 this issue whether they're user devices as distinct from just
23 devices generically.

24 **THE COURT:** You say that's what Dr. Keromytis doesn't
25 do?

1 **MR. SAULSBURY:** That's exactly right. Dr. Keromytis
2 just asserts that the products meet the limitations of the
3 claim. That's not sufficient.

4 Under the *Sony* case that we cite in our briefing, the
5 Federal Circuit has said that in order to oppose summary
6 judgment, a patentee's expert actually has to have a fact-based
7 analysis that's tied to logic that explains why the accused
8 instrumentality actually meets the claim as construed. We
9 don't have that here. We just have a bare assertion that the
10 limitation is met.

11 Turning to Slide 5, this is the paragraph -- this is
12 paragraph 384, the paragraph that Dr. Keromytis referenced in
13 his deposition testimony. As you can see, there's nothing here
14 that explains how the WF-500 is a user device as distinct from
15 any device. He merely says that the WF-500 appliance sandboxes
16 all files locally and analyzes them for malicious behaviors
17 using the same engine used by WildFire Cloud. He's just
18 saying, "My analysis is the same for Public Cloud." He doesn't
19 attempt to explain how it's a user device.

20 Turning to page -- turning to Slide 6, this is Finjan's
21 opposition evidence in support of its assertion that the
22 WildFire Public Cloud is a user device.

23 Again, there's no actual expert analysis addressing how
24 the WildFire Public Cloud, which is cloud infrastructure, is a
25 user device as distinct from just a device generically. He

1 merely asserts the accused products, including WildFire alone,
2 NGFW in combination with WildFire, and Traps in combination
3 with WildFire meet this limitation. That's the highlighted
4 portion of the first excerpt. Conclusory assertion doesn't
5 satisfy their burden opposing summary judgment.

6 The next excerpt at the bottom, it's of the same nature.
7 It's a conclusory assertion that the accused products meet the
8 claim term. The Federal Circuit has said that's not enough.

9 Finally, we get to Slide 7. This is the last of the
10 excerpts from Dr. Keromytis' report that Finjan relies on.
11 Here, Dr. Keromytis says [as read]:

12 "WildFire is a downloadable-information destination
13 because it is a device -- a user device or otherwise --
14 that includes one or more devices or processes that are
15 capable of receiving and initiating or otherwise hosting a
16 mobile code execution."

17 This suffers from the same problem that we identified
18 earlier. That's the -- there's a couple problems with this,
19 but the first is it's merely a conclusory assertion that the
20 claim limitation is met. He doesn't make any attempt to
21 explain how the WildFire Public Cloud is somehow a user device
22 as distinct from any other sort of device.

23 Additionally, if we take -- if we take a look at what he's
24 literally saying, he says that it's a device, a user device or
25 otherwise, which means -- which, as a logical matter, means

1 he's not even taking the position that it's a user device.

2 It's like saying the accused animal is a mammal, a cat or
3 otherwise; right? It's not -- he's not actually taking the
4 position that it is, in fact, a user device. And so that is a
5 second problem beyond the more foundational problem, that he
6 has no analysis supporting his bare assertion that it's a user
7 device.

8 I think that's compounded by his Footnote 87, which
9 Dr. Keromytis acknowledges that he's interpreting the term
10 "user device" extremely broadly in a manner that's inconsistent
11 with how the Court construed it.

12 He says [as read]:

13 "The term 'user device' as used in the '633 patent is
14 quite broad. For example, the patent describes 'user
15 device' as a receiving device or process."

16 That's essentially the construction that Finjan sought.
17 They sought a construction under which a user device is a
18 device that can perform a variety of functions, including
19 receiving and processing.

20 But the Court rejected that construction and additionally
21 included the term "user." Finjan was required to give some
22 significance to the term "user." It hasn't. Dr. Keromytis has
23 essentially read it out of the claims and, therefore, Palo Alto
24 Networks is entitled to summary judgment on the '633 patent.

25 **THE COURT:** Mr. Denning.

1 **MR. DENNING:** Yes, Your Honor. Thank you.

2 I think it's interesting when we look at paragraph 381,
3 which is the one that is up on the screen now, and contrast it,
4 you have to put it in context of Dr. Keromytis' report.

5 So if we can go to the slide before that, Slide 6, please.

6 This one shows paragraph 379, two paragraphs before the
7 one that we were just looking at. And here's what
8 Dr. Keromytis says there. He says [as read]:

9 "I understand the parties dispute how the Court
10 should construe the term 'downloadable-information
11 destination.' I further understand Finjan's proposed
12 construction for this term is a device or process that is
13 capable of receiving and initiating or other hosting a
14 mobile code execution."

15 And then he says [as read]:

16 "I further understand PAN's proposed construction for
17 this term is a user device that includes one or more
18 devices or processes that are capable of receiving and
19 initiating or otherwise hosting a mobile code execution."

20 And then he said [as read]:

21 "As I explain, WildFire and NGFW and Traps in
22 combination with WildFire each satisfied both parties'
23 proposed constructions for this term."

24 Now, ultimately the Court did include user device as was
25 in PAN's proposed construction. Dr. Keromytis said, before the

1 Court ever ruled on this, because these reports were done
2 several years ago, said, "I think it meets that under the PAN's
3 proposed construction as well."

4 So when we then go to Slide 7, two paragraphs later, the
5 same page in Dr. Keromytis' report, and he says [as read]:

6 "WildFire is a downloadable-information destination
7 because it is a device -- a user device or otherwise --
8 that includes one or more devices of processes and carries
9 on."

10 Clearly when he says "a user device or otherwise," he's
11 meaning under PAN's proposed construction or under Finjan's
12 proposed construction. It's right after he just said, "Under
13 both of those proposals, I think it meets the limitation."

14 So he is not here making some sort of logical
15 insufficiency. He's just saying, "Under this one or under that
16 one, I think it meets the limitation."

17 He -- it is not insignificant that Dr. Keromytis then
18 drops the footnote and talks about the use of the term "user
19 device" within the '633 patent; and, indeed, the '633 patent
20 uses the term "user device" very broadly. It talks about it as
21 a receiving device or process. It says that a user device --
22 user device may operate as a firewall/server. So something
23 that's a firewall and a server can be a user device in the '633
24 patent. It describes that in the specification. Dr. Keromytis
25 is recognizing that as he is applying that term to WildFire.

1 Dr. Keromytis was also asked in deposition, and this is in
2 Exhibit E, page 284, line 16, to 285, line 11, whether WildFire
3 servers are a, quote, "client device," and he said they are.
4 Counsel for PAN never asked him if he thought that they were a
5 user device, but he testified they are a client device.

6 In contrast, Dr. Rubin's opinions that WildFire is not a
7 user device are based on very narrow meaning of "user device"
8 that was rejected by the Court and adds additional limitations.

9 PAN points to Dr. Rubin's opinion that WildFire virtual
10 machines are implemented as a cloud-base solution and are not
11 devices which provide direct user interaction, let alone being
12 client endpoint devices. There's nothing in the Court's
13 construction about providing direct user interaction or being a
14 client endpoint device. Dr. Rubin's opinions are beside the
15 point here.

16 Similarly, for WildFire 500, Dr. Rubin said [as read]:

17 "WildFire appliance is a private cloud appliance
18 which is a dedicated device separate from a user
19 device/client device while user device can be separate
20 from another user device."

21 Dr. Rubin's opinion is not relevant to the point at hand.
22 Dr. Keromytis' opinion stands in contrast. And that's really
23 the issue; that the jury should listen from both of these
24 gentleman and make a decision about what a -- whether this is a
25 user device or not.

1 This was a discussion we had during the *Markman* hearing a
2 few months ago when this -- when this term was being discussed
3 and counsel for PAN said, when we expressed some concern that a
4 jury might think "user device" and think their iPhone or their
5 laptop, and we said [as read]:

6 "The specification has a much broader use of the term
7 'user device' and we're worried that a lay juror is going
8 to be confused by the term 'user device.'"

9 Counsel for PAN said [as read]:

10 "Your Honor, that's an issue that the experts will
11 address."

12 Counsel said on the jury confusion point [as read]:

13 "We don't believe there will be any confusion over
14 user device. We don't believe the jurors are going to
15 believe that iPhones are the only user devices but, of
16 course, there will be technical experts that are going to
17 testify to assist the jury in that regard."

18 That's what counsel for PAN argued to this Court trying to
19 persuade this Court to include user device in the construction.
20 This Court did so. And now when Finjan's expert is prepared to
21 testify that WildFire is a user device, as that term is used in
22 the '633 patent, PAN is trying to preclude the jury from ever
23 hearing that opinion.

24 Finally, it's worth spending one minute reminding how we
25 got to that construction at the *Markman* hearing. There was

1 a -- Judge Freeman construed the same term in the *Cisco* case,
2 and Your Honor found that you would adopt the same construction
3 that Judge Freeman adopted, and that included user device.

4 But it's worth noting that in Judge Freeman's order that
5 construed that claim, she recognized -- the Court recognized
6 that "user device" is not a narrowly defined term.

7 Judge Freeman said [as read]:

8 "Cisco contends that the information destination of
9 the downloadable information must be the final destination
10 of a downloadable on the grounds that the specification
11 describes that an unexecutable downloadable is sent to the
12 client that originally requested the downloadable. The
13 Court finds this argument unpersuasive."

14 And then the Court went on to say [as read]:

15 "More importantly, the specification explicitly
16 equates information with user device and describes that a
17 user device can include one or more devices or processes,
18 such as e-mail, browser, or other clients that are capable
19 of receiving and initiating or otherwise hosting a mobile
20 code execution. In addition, the specification discloses
21 that a user device can operate as a firewall and server."

22 So when this Court adopted the *Cisco* construction, that
23 just gives some context to how the *Cisco* court came to that
24 construction "user device" doesn't mean just your phone.

25 Dr. Keromytis has opined with support that WildFire is a

1 downloadable device.

2 Now, maybe there's some interesting cross-examination that
3 counsel for PAN will have for Dr. Keromytis at trial, but he's
4 laid out the basis for his opinion, and that is enough to
5 defeat summary judgment at this stage.

6 **THE COURT:** Very briefly.

7 **MR. SAULSBURY:** Yes, Your Honor.

8 So I'll note that we still have not heard anything about
9 what makes the accused WildFire devices user devices as
10 distinct from devices generally.

11 We were pointed by counsel to Slide 6 where Dr. Keromytis
12 says he thinks there's infringement under either party's
13 construction. That's a bare assertion. It's precisely the
14 type of bare assertion the Federal Circuit rejected in the
15 *Intellectual Science* case, *DynaCore Holdings* case, and *Schwing*
16 cases that we cited in our briefing.

17 We've -- we heard from counsel that the specification
18 acknowledges that a user device can be configured to be a
19 firewall or a server. Our position isn't inconsistent with
20 that at all; but in order for there to be infringement, their
21 expert still needed to show that whatever firewall or server
22 they were contending was a user device, was a user device in
23 the first place that was then configured to be a firewall or
24 server, much like one could argue that when I turn my iPhone
25 into hotspot mode, it has been configured to be a gateway but

1 there's no analysis of that whatsoever. There's no analysis of
2 how it's a user device to begin with.

3 And counsel also suggested this is an issue for the jury.
4 Their expert should be permitted to explain to the jury how the
5 accused WildFire devices are user devices. But, again, he has
6 nothing to explain to them because he has done nothing to
7 analyze what makes these devices a user device.

8 And so for that reason, we're entitled to summary judgment
9 on the '633 patent.

10 **THE COURT:** Okay. Let's go on to '731.

11 **MR. SAULSBURY:** Certainly, Your Honor.

12 **MR. DENNING:** Your Honor, on this point, I spoke with
13 counsel for PAN before the hearing. We had a couple different
14 infringement theories that we were pursuing in this case. One
15 of them involved something called the AV Signature; and to
16 streamline the case and to streamline the presentation at
17 trial, we do not intend to pursue that particular infringement
18 theory.

19 **THE COURT:** Okay.

20 **MR. DENNING:** And so I don't think we need to address
21 it today.

22 **THE COURT:** Okay.

23 **MR. SAULSBURY:** Thank you, Your Honor.

24 And if I may approach, I have handouts for the '731.

25 **THE COURT:** Okay.

1 **MR. SAULSBURY:** They do contain slides on the
2 AV Signature issue.

3 **THE COURT:** So you're going to skip over those?

4 **MR. SAULSBURY:** Exactly right, Your Honor. We
5 understand that they're out of the case.

6 **THE COURT:** Okay.

7 **MR. SAULSBURY:** So for the '731 patent, as Your Honor
8 knows from the *Markman* hearing, there are two main limitations
9 that really matter here. The claims -- all asserted claims
10 require a security profile, which the asserted claims
11 explicitly say comprises a list of computer commands or some
12 other claims say comprises a list of one or more computer
13 commands. But the point is, there has to be a security
14 profile; it has to have at least one computer command.

15 The other requirement found in all asserted claims is that
16 there has to be a security profile cache for storing the
17 security profiles that we just talked about.

18 So the net of those two requirements is that Finjan in
19 order to show infringement had to show the presence of a
20 security profile containing at least one computer command that
21 was present in a security profile cache.

22 Now, we also know from the claim construction hearing that
23 a cache is temporary storage. In Finjan's opposition, it noted
24 that "security profile cache" was not the precise term that the
25 Court construed. We note that it is a term that was proposed

1 for construction. Regardless, I don't think there's a dispute.
2 Finjan doesn't actually argue that the cache in security
3 profile cache should encompass permanent storage. I think it's
4 understood that a security profile cache is temporary storage
5 just like the cache that Your Honor construed at *Markman*.

6 And so turning to page -- it's at Slide 4, as we can see,
7 there's -- just to reiterate, there's two different
8 requirements. There has to be the security profile with one or
9 more computer commands and that security profile has to be in
10 temporary storage.

11 Now, when we got here, there were a couple of different
12 theories. I think we're down to essentially two plus doctrine
13 of equivalents, and so we'll address them in turn.

14 The first is WildFire reports. And Finjan's expert took
15 the position that WildFire reports are the security profile.
16 The problem with the WildFire reports theory is that there is
17 no evidence that WildFire reports, even if they can be
18 considered as having computer commands, are present in
19 temporary storage.

20 And so in Finjan's opposition brief, what it points to is
21 the temporary storage is Local DB. This is one of the
22 databases that both experts analyzed. The problem with
23 Local DB as it relates to the WildFire reports is that there
24 was no evidence that the WildFire reports are ever stored in
25 Local DB. And so it's an issue where we don't have -- where

1 one of the two limitations is missing. In this case, it's the
2 requirement that the WildFire reports be stored in temporary
3 storage.

4 That takes us, then, to a couple slides on the
5 AV Signatures, which are no longer in the case, and so we will
6 skip on past those.

7 And that takes us to Slide 8. And so Slide 8 addresses a
8 couple of newer theories that we found in Finjan's opposition
9 where it asserts that various scan results and analysis results
10 are the security profile that are stored in a security profile
11 cache and, therefore, supposedly meet the claims.

12 The problem with this theory is that there is no evidence
13 that the scan results and analysis results that they rely on in
14 their opposition meet the express requirement of the security
15 profile as containing one or more computer commands.

16 Very much like the issue we saw with the '633 patent that
17 we just went over, the only thing that they can point to is
18 conclusory assertions by their experts saying that the claim
19 limitation is met. We know from the Federal Circuit that that
20 is not sufficient to defeat summary judgment.

21 And so on Slide 8 we see an excerpt that Finjan relies on
22 from Dr. Jakobsson's report. He asserts that the analyzer,
23 PAN's analyzer, finishes sample processing and outputs result
24 data into Local DB. And he asserts that this, quote, "maps to
25 the functionality required by the security profile cache since

1 it stores the scan results (i.e., the security profiles derived
2 by the scanner including a list of computer commands...)"

3 That's just parroting the claim language. He has no
4 analysis identifying what the supposed computer commands are
5 that are present in the results data. There's no
6 identification of that whatsoever.

7 And so this is just like the *Intellectual Science* case in
8 which the Federal Circuit found that the expert opinions there
9 fail to set forth facts in a line of reasoning with a logical
10 foundation sufficient to show infringement.

11 There are a host of other results -- scan results,
12 analysis results, et cetera -- covered in Finjan's opposition.
13 The same problem applies with respect to each of them.

14 If you take a look at the only evidence they have for the
15 proposition that they contain computer instructions, it's the
16 bare assertion of their expert. There's zero identification of
17 any actual computer instructions.

18 Finally, that takes us to DOE. I think this is pretty
19 straightforward because Dr. Jakobsson's DOE theory doesn't
20 address the absence of computer instructions. We've produced
21 his DOE theory on Slides 9 and 10 of the slide presentation.
22 And so we can see from these four paragraphs what he's trying
23 to address is he's essentially saying: Even if it's understood
24 that the locations in which the security profiles are stored is
25 not temporary, it's still temporary under the doctrine of

1 equivalents. I, therefore, find that there's still a security
2 profile cache under the doctrine of equivalents.

3 But the foundational problem with this theory is that it
4 doesn't address the separate requirement that there has to be a
5 security profile containing one or computer instructions.
6 Therefore, it cannot -- the DOE theory cannot cure the
7 foundational problem with the analysis results and scan results
8 that Finjan relies on because there is still no computer
9 instructions.

10 **THE COURT:** Okay.

11 **MR. DENNING:** I'll start right there at the end.

12 So counsel showed a slide that had WildFire reports and
13 then scan results or analysis results as a separate column.
14 Those are the same thing, and Dr. Jakobsson treats them as the
15 same thing throughout his report. The scan results, analysis
16 results, analysis reports, WildFire reports, that's what comes
17 out of WildFire after it has analyzed the suspicious code.
18 It's all the same thing.

19 So is there any chance that I could use the ELMO?

20 **THE CLERK:** Sure. Oh, the ELMO? Okay. Yeah.

21 **MR. DENNING:** Thank you so much.

22 So I'm going to start near the end of counsel's
23 presentation where he said there's absolutely no evidence from
24 Dr. Jakobsson that those scan results contain a list of the
25 tasks or program that the suspicious code was seeking to

1 execute.

2 **THE CLERK:** It's on. For some reason it's not working
3 now. Hold on one second.

4 (Pause in proceedings.)

5 **MR. DENNING:** So I'm showing, Your Honor, this is
6 Exhibit --

7 **THE CLERK:** It's still not working.

8 **MR. DENNING:** Oh, it's not showing on yours?

9 **THE CLERK:** It's not showing anywhere.

10 **THE COURT:** You'll have to go to Plan B.

11 **MR. DENNING:** Plan B, Your Honor.

12 **THE COURT:** Yes, Plan B.

13 **MR. DENNING:** I will -- I will show you based on the
14 exhibits to the briefing.

15 **THE COURT:** Okay.

16 **MR. DENNING:** So I'm looking at Exhibit 14 to PAN's
17 opening brief, opening summary judgment brief, and those are
18 excerpts from Dr. Jakobsson's expert report, and I will direct
19 your attention to paragraph 658 to start with. I'm going to
20 show you a few of these just because I really think I need to
21 disprove the point that counsel for PAN just made.

22 At paragraph 658 Dr. Jakobsson said [as read]:

23 "As part of the malware sandboxing process, WildFire
24 scans for behaviors and provides a listing of behaviors
25 (i.e., behavior summary) which correspond to a list of

1 computer commands that a corresponding one of the incoming
2 files is programmed to perform."

3 It's exactly that, the list of computer commands that this
4 incoming file is programmed to perform.

5 And then Dr. Jakobsson pastes in an example from a PAN
6 document. It says "Example" on top. So this is at the top of
7 page 228 of his expert report. There's an example that's
8 called "Behavioral Summary," and it lists all of the things
9 that that suspicious code was trying to do: Use the HTTP post
10 method, attempted to sleep for a long period, connected to an
11 IP address over HTTP. That's a listing of the things that this
12 suspicious code was attempting to execute.

13 And Dr. Jakobsson said, "Those are computer commands that
14 correspond to the incoming file." That's the scan analysis
15 report.

16 In paragraph 664 of his report, which is just a few pages
17 later, Dr. Jakobsson talks about testing and says [as read]:

18 "Testing of WildFire and the NGFW show -- in addition
19 to PAN documentation, explains that reports are generated
20 for WildFire and NGFW based on the incoming file that is
21 analyzed and that the report will show detailed behavioral
22 information, including a behavioral summary (deriving a
23 security profile, including a list of computer commands
24 that a corresponding one of the incoming files is
25 programmed to perform)."

1 And then he attaches snippets from documents from PAN that
2 say things like [as read]:

3 "The WildFire reports will show detailed behavioral
4 information for the sample."

5 And then it shows actual, on pages 6- -- 234, 235 shows
6 actual sample reports. This is the scan results, the analysis
7 results. And on page 237 we see a heading called "Behavioral
8 Summary," and it lists all the things that this suspicious code
9 was trying to do [as read]:

10 "Each virtual machine tab summarizes the behavior of
11 the sample file in the specific environment. Examples
12 include whether the sample created or modified files,
13 started a process, spawns new processes, modified the
14 registry, or installed browser helper objects."

15 This is exactly what counsel for PAN just said isn't in
16 Dr. Jakobsson's report at all, and it is in here over and over
17 again. Paragraph 667 shows additional reports from his own
18 testing. Dr. Jakobsson tested this product on his own in
19 addition to looking at the source code, and at page 241 he
20 shows the behavioral summary portion of the results that came
21 back from his own testing of this product.

22 So there is no question and there can be no question that
23 these scan reports do include the type of behavior that this
24 suspicious code was trying to execute. Certainly at the very
25 least for purposes of today, a reasonable jury could find that

1 based on Dr. Jakobsson's expert report, that it is included in
2 there.

3 Okay. So that's the first part. This is the security
4 profile that includes a list of computer commands that the
5 corresponding file was to perform.

6 The second question then presented by counsel for PAN is:
7 Yeah, but is that stored in temporary storage? And, yes, it
8 absolutely is.

9 Dr. Jakobsson opines that, quote [as read]:

10 "Security profiles (e.g., scan results or analysis
11 reports following a scan) are stored in a security profile
12 cache (e.g., in a local database such as Local DB,
13 Central DB, Virus Database, or in disk storage after a
14 scan ends)."

15 There's also -- there are multiple cites here. I'm
16 looking at paragraph -- this is page 19 of our opposition,
17 lines 13 through 19, showed PAN documentation that say exactly
18 that; that the Wild -- this is, quote, "The WildFire analyzer
19 stores analysis results and intermediate data derived security
20 profile in Local DB," which he says is a security profile
21 cache.

22 All right. So we know that these scan results have the
23 program information. They're stored in Local DB. The next
24 thing we need to know is: What is Local DB and is it temporary
25 storage? And we know for sure that it is.

1 If we look on page 19 of our opposition, there is a
2 snippet from a PAN document. This isn't something
3 Dr. Jakobsson is opining on. This is a PAN document that says
4 [as read]:

5 "Local DB in each PU for analyzer to temporarily save
6 the analysis results and intermit data."

7 PAN's own document -- this is -- it's Exhibit H to the
8 opposition at 337. PAN's own document says that its Local DB
9 is temporary storage.

10 Based on all of that, there can be no dispute that it
11 meets the limitation, let alone that a reasonable jury could
12 find that it meets this limitation.

13 I think I'm done, Your Honor. Let me check -- oh, no.

14 I want to say one thing about the doctrine of equivalents
15 point. I don't think we need to get there because I think we
16 have this under literal infringement, but Dr. Jakobsson's
17 opinions go on for hundreds of pages and hundreds of paragraphs
18 before this.

19 So when he says in the doctrine of equivalent section,
20 "Based on the things I talked about before, it would also meet
21 the same function, way, and result," he's not doing that in a
22 vacuum. It's based on hundreds of pages and hundreds of
23 paragraphs of his analysis.

24 And his statements in each of these paragraphs is not
25 simply function, way, result. He gives an explanation. For

1 example, for the function test, he says [as read]:

2 "The security policy cache for each of the accused
3 products at least temporarily store the index security
4 policy derived from the scanner's static and dynamic
5 behavioral analysis of the file."

6 He said similar things for the way and for the results.
7 This wasn't just a bare doctrine of equivalents analysis.

8 And with that, I'll conclude on the '731, Your Honor.

9 **THE COURT:** Okay.

10 **MR. SAULSBURY:** So just briefly a few points,
11 Your Honor.

12 On the doctrine of equivalents, I don't think we need to
13 go there because we heard nothing about how it addresses the
14 problem with security profiles. We only heard about how it
15 addresses temporary storage.

16 And then going to where counsel started, there was an
17 assertion that WildFire reports are the same as the scan
18 results and the analysis results. That's not Dr. Jakobsson's
19 opinion. If we take a look at his report, throughout when he's
20 talking about WildFire reports, he uses capital W, WildFire,
21 capital R, Report. That's a specific thing he identifies.

22 And when he's talking about WildFire reports, he attempts
23 to map it to something that is stored in temporary storage, but
24 he fails to. And as we explained earlier, that's why WildFire
25 reports can't be sufficient because even if -- even if they

1 could be understood to include computer commands, they're not
2 stored in temporary storage.

3 That, then, takes us to all the scan results and analysis
4 results that we heard counsel address. And the problem with
5 those, again, is that there's not actually any opinion other
6 than a conclusory assertion they contain computer instructions.
7 There's no identification of computer instructions.

8 We heard a bunch of references to portions of
9 Dr. Jakobsson's report. I'll just take one as an example. We
10 were pointed to paragraph 658, and we were told that he
11 identifies computer commands right there. What he actually
12 says is [as read]:

13 "As part of the malware sandboxing process, WildFire
14 scans for behaviors and provides a reporting" -- "report
15 listing the behaviors which correspond to a list of
16 computer commands."

17 He says "correspond to." He doesn't actually say there
18 are computer commands there nor does he identify what the
19 purported security profile is much less identify temporary
20 storage, a cache, that it's located in.

21 And so what we have here is they were required under the
22 claims to identify a specific security profile that was stored
23 in a specific cache that is temporary storage. Instead, they
24 point to all sorts of different random references to different
25 scan results that they assert contain computer commands, but

1 there's not actually evidence of that.

2 And, moreover, there's not any tying of a specific scan
3 result that contains computer instructions to temporary
4 storage.

5 And for that reason, we're entitled to summary judgment,
6 Your Honor.

7 **THE COURT:** I know you're busting at the seams to say
8 something, so I'll let you say something.

9 **MR. DENNING:** Just if you turn the page, right after
10 that paragraph he read on 658 is the example that lists the
11 commands that I just discussed with you. So it's not just a
12 bare assertion. He's pointing to the example that he includes
13 there.

14 **MR. SAULSBURY:** He says "correspond to a list of
15 computer commands."

16 **THE COURT:** I gotcha.

17 Okay. I know I have other motions that are pending, but
18 today's hearing were focused on the motion for summary judgment
19 by PAN. So I will take that under submission and work on it.

20 **MR. SAULSBURY:** Thank you very much, Your Honor.

21 **THE COURT:** Thank you.

22 **MR. DENNING:** And may I say one thing to the Court?

23 **THE COURT:** Yes.

24 **MR. DENNING:** You had asked in the order that you
25 submitted after filing the opening briefs with regard to

1 Finjan's motion for summary judgment of no invalidity --

2 **THE COURT:** Yes.

3 **MR. DENNING:** -- you had asked the parties to indicate
4 in our briefs whether it's necessary to reach those --

5 **THE COURT:** Yes.

6 **MR. DENNING:** -- should you grant.

7 We neglected to do that in our reply brief. I apologize
8 to the Court. I can tell you now that if you find no
9 infringement of any of the -- of all three patents, then you
10 would not have to reach that.

11 **THE COURT:** Fine.

12 Which is also your position.

13 **MR. SAULSBURY:** That's right, Your Honor.

14 **THE COURT:** Yeah.

15 **MR. SAULSBURY:** Thank you.

16 **THE COURT:** Okay. Thank you.

17 (Proceedings adjourned at 3:19 p.m.)

18 ---oOo---

19

20

21

22

23

24

25

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, November 21, 2024

A handwritten signature in black ink, reading "Kelly Shainline", is written over a horizontal line.

Kelly Shainline, CSR No. 13476, RPR, CRR
U.S. Court Reporter